

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

XEZAKIA ROUSE,
Plaintiff,

v.

No. CV 11-0433 MV/CG

SGT. TOBY L. BACA,
OTHER UNNAMED SGT.,
Defendants.

ORDER

THIS MATTER is before the Court on several of Plaintiff Xezakia Rouse's motions, including his *Motion for Court Appointed Counsel or Investigator or Order to Produce Evidence*, (Doc. 4), *Plaintiff's Request for Subpoena*, (Doc. 18), and *Motion to Add Witness Statement*, (Doc. 21). The three motions request, in various permutations, that the Court order Defendant to preserve and present evidence relating to the purported assault which forms the basis of his complaint, and that the Court consider evidence in support of his claims.

With regard to the *Motion for Court Appointed Counsel or Investigator or Order to Produce Evidence*, Mr. Rouse requests that the Court order the Defendant to preserve any and all documentation and photographs relating to Sergeant Baca's purported assault. (Doc. 4 (requesting that the Court "order the prison to release camera evidence and pictures (color) along with medical reports, internal affairs reports and any other material evidence to me for preparation of case.")). Mr. Rouse advises that the New Mexico Department of Corrections typically discards such physical evidence within a year of the

incident. (*Id.*). In the alternative, Mr. Rouse requests that the Court appoint counsel or an investigator so that counsel may obtain the relevant documentation. (*Id.*).

The Court has already denied Mr. Rouse's request for a court-appointed attorney. (Doc. 29). Moreover, the Court has directed Defendant to prepare a *Martinez* report in this case. (See Doc. 28). *Martinez* reports are typically ordered in cases alleging constitutional violations within prison walls in order to expand the record before the Court. *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). The order directs Defendant to provide the names of all parties involved in the purported assault, all medical evidence relating to the assault, and all video recordings relating to the assault. (*Id.* at 3). Mr. Rouse's request that evidence be presented to the Court is therefore moot. However, inasmuch as Mr. Rouse's motion requests that Defendant be enjoined from discarding or destroying any physical or documentary evidence relating to the assault, the Court finds this request to be reasonable.

Mr. Rouse's *Request for Subpoena* requests that the Court subpoena "all camera evidence from prison authorities on the date of 4-May-2011[,] as well as any internal affairs reports, disciplinary reports, and all pictures and medical documents relating to the incident. (Doc. 18). The issuance of subpoenas are a part of the traditional discovery process. However, civil rights cases initiated by incarcerated plaintiffs are excluded from the usual pretrial discovery procedures. See D.N.M.LR-Civ.16.3(d). No scheduling order has been entered, and the docket reflects no agreement by the parties to start discovery on their own. See D.N.M.LR-Civ. 26.4(a) and 26.5(a). As noted above, the Court has already directed Defendant to produce the materials that Mr. Rouse wishes to have subpoenaed. Therefore the motion will be denied.

Finally, the *Motion to Add Witness Statement* requests that the Court "accept" the

statement of George Evans, a fellow inmate who witnessed the assault on Mr. Rouse and who can testify on his behalf. (Doc. 21). The Court will accept Mr. Evans' statement and will consider it along with Mr. Rouse's response to Defendant's court-ordered *Martinez Report*.

IT IS THEREFORE ORDERED that the *Motion for Court Appointed Counsel or Investigator or Order to Produce Evidence*, (Doc. 4), be **GRANTED IN PART AND DENIED IN PART**. Defendant Baca shall be enjoined from discarding or destroying any physical or documentary evidence relating to the purported assault.

IT IS FURTHER ORDERED that *Plaintiff's Request for Subpoena* be **DENIED**;

IT IS FURTHER ORDERED that the *Motion to Add Witness Statement*, (Doc. 21) be **GRANTED**.



THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE